No. 79-5790

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

MILTON BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-3) is not reported. The memorandum and order of the district court (Pet. App. 4-9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1979. The petition for a writ of certiorari was filed on December 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel because he was represented at trial by an attorney who simultaneously represented a government witness in a disciplinary hearing before the Drug Enforcement Agency.

STATEMENT

a. Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on six counts of possessing, manufacturing, and possessing with intent to manufacture and distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and 844(a). He was sentenced to 15 years' imprisonment on each of counts one through five, and to one year's imprisonment on count six. The sentences on counts one through three were consecutive to each other, and those on counts four through six concurrent with each other and with the other sentences. In addition, petitioner was sentenced to concurrent special parole terms of three years on counts one through five.[1/]

The uncontested evidence at trial showed that on the evening of August 29, 2974, DEA agents and officers of the Anchorage Police Department searched petitioner's house in Anchorage, Alaska, pursuant to a federal search warrant (Tr. 10-11). In petitioner's bedroom they found large quantities of heroin and cocaine, a small amount of marijuana, and various items that constituted a veritable assembly line for the manufacture and packaging of heroin and cocaine (Tr. 17-247). Some of these items were hidden under the bed, in dresser drawers, and inside a travel bag; other items were located in plain view on a nightstand (Tr. 17-58, 62-71, 77-90, 94, 118-134). DEA Agent Edward Burke testified that during the search petitioner told him that the drugs found in the house belonged to petitioner and not to the three girls who were also present in the house at the time the search warrant was executed (Tr. 12, 339). In addition agents Burke and Daniel O'Brien testified that while he was being taken to the

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1/ Following the affirmance of his conviction on appeal, petitioner moved for a reduction of sentence pursuant to Rule 35, Fed. R. Crim. P. (R. 180-182). The district court granted the motion, reducing the 15-year sentence on count 3 from a consecutive to a concurrent term of imprisonment (R. 206-207).

police station, petitioner told them that he was a drug addict and dealt in heroin but that since he had gotten himself into this predicament he did not want to "snitch" on his source (Tr. 352-370).

In August 1975, after his conviction and the filing of a notice of appeal (R. 112), petitioner moved the district court for a new trial on the basis of newly discovered evidence concerning the credibility of Agent Burke. He also moved the court of appeals to remand the case to the district court for a hearing (R. 134-138). These motions were denied, and in April 1976 the court of appeals affirmed petitioner's conviction (R. 177-178).

b. Petitioner thereafter moved to vacate his sentence under 28 U.S.C. 2255, claiming that he had been denied the effective assistance of counsel because his trial attorney, Joseph Palmier, had also simultaneously represented Agent Burke in a DEA disciplinary action (R. 209). After initially denying petitioner's motion to vacate judgment (R. 231-232), the district court granted his motion for reconsideration and scheduled an evidentiary hearing to determine (1) whether trial counsel had a conflict of interest; (2) whether cross-examination of Agent Burke as to the disciplinary proceedings against him would have been proper at trial; and (3) whether, if a conflict of interest did exist, such conflict prejudiced petitioner (R. 295-296).[2/]

2/ In an amended motion to vacate judgment filed March 20, 1978, petitioner further claimed that the prosecuting attorney was aware of the conflict of interest before trial, yet failed to inform either petitioner or the trial judge of such conflict (R. 402, 421-424). The district court denied petitioner's amended motion to vacate judgment, stating that petitioner's original motion adequately covered the conflict-of-interest issue, and that petitioner's allegations concerning the prosecutor's knowledge of the conflict were at best cumulative (R. 629-531). Petitioner appealed this ruling. The court of appeals dismissed the appeal, but nonetheless addressed the issue of alleged prosecutorial misconduct in its order affirming the district court's denial of petitioner's original motion to vacate judgment (Pet. App. 1-3).

Facts stipulated during the evidentiary hearing showed that after being retained by petitioner in September 1974 to represent petitioner in the criminal proceedings against him, attorney Palmier in December 1974 agreed to represent Agent Burke in a disciplinary action brought against Burke by the Drug Enforcement Administration. The action charged Burke with associating with known criminals, creating an improper relationship with sources of information, conduct prejudicial to the government, falsification of DEA reports and misuse of his official position. At petitioner's trial, Palmier did not cross-examine Burke about the disciplinary action (R. 404-405, 522).

c. The district judge, the same judge who had tried the case, denied petitioner's motion to vacate judgment, finding that although petitioner's trial counsel had a conflict of interest, and although cross-examination concerning Agent Burke's disciplinary proceedings would have been proper, petitioner suffered no prejudice as a result of the conflict (Pet. App. 4-8). The court of appeals affirmed (Pet. App. 1-3).

ARGUMENT

1. Petitioner claims (Pet. 6-19) that his attorney, in representing Burke in the DEA's disciplinary proceedings at the same time he was representing petitioner in this case, involved himself in a conflict of interest that denied petitioner the effective assistance of counsel, since it may have caused the attorney to forego a more probing cross-examination of Burke. Although we believe that this dual representation was very ill-advised, we do not believe that, on the facts of this case, it constituted reversible error.

In Holloway v. Arkansas, 435 U.S. 475 (1978), this Court held that whenever a trial court, over timely objection, improperly requires joint representation of defendants with conflicting interests, reversal is automatic, and is not dependent upon a

showing of specific prejudice. The Court declined to apply a harmless error rule, stating (435 U.S. at 490-491) (citations omitted):

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil * * * is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. * * * And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error * * * would require, unlike most cases, unguided speculation.

In contrast to the joint representation in the same case of parties with conflicting interests, however, the fact that the government witness was represented by petitioner's counsel in a substantially unrelated civil proceeding created no realistic possibility of adverse influence on the attorney's presentation of petitioner's overall defense -- a point petitioner does not appear to dispute. At most, this circumstance might have affected the manner in which counsel conducted his cross-examination of Agent Burke. Assuming arguendo that the failure of petitioner's attorney to inquire on cross-examination into the disciplinary proceedings pending against Burke sprang from constraints imposed by the attorney-client relationship, an inquiry into the prejudicial impact of his failure to impeach Burke's credibility does not require "unguided speculation." Rather, both the scope and the impact of such curtailment are readily identifiable, and "the

reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury" (ibid.). Both courts below undertook this assessment, and agreed that the dual representation could not have prejudicially affected petitioner. We submit that their conclusion was correct.

Completely discounting Burke's testimony, the remaining evidence against petitioner was overwhelming. It showed that large quantities of heroin and cocaine, as well as numerous items for the manufacture and packaging of those drugs, were seized from a bedroom in petitioner's house[3/] during the execution of a search warrant. Some of these items were hidden in the bedroom in various locations; others were in plain sight. When the DEA agents and the Anchorage Police arrived to execute the search warrant, they saw petitioner, dressed in a bathrobe, come out of this bedroom; no one else was in the bedroom at the time (Tr. 299-301, 410, 612-614, 627-628). Inside the bedroom, the officers found clothing and personal papers belonging to petitioner (Tr. 151, 316). In addition, jewelry that petitioner claimed belonged to him was found in the same dresser drawers from which the officers seized approximately 60 balloons and 14 slips of paper, each containing heroin (Tr. 77-90, 316-319). Petitioner's fingerprints were found on some additional slips of paper containing heroin, found inside a travel bag in the bedroom (Tr. 139-143, 451-453). Also, a balloon containing heroin was found inside the pockets of a pair of pants that were hanging on the bedpost, and into which petitioner changed prior to accompanying the officers to the police station (Tr. 320-322, 387, 547-548). Before leaving for the police station, petitioner told DEA Agent Daniel O'Brien that he saw that O'Brien knew what was going on (Tr. 355). Finally, en route to the police station, petitioner admitted to O'Brien that he was a drug

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3/ Petitioner rented the house and personally paid the rent each month in cash (Tr. 276, 286-287).

addict, and that he dealt in heroin, but only with persons who were already addicted (Tr. 365, 370). According to O'Brien's account, when petitioner was asked if he wished to cooperate, he replied that he had gotten himself into the instant predicament, and did not want to implicate his source (Tr. 307-369).

In light of this compelling independent evidence of petitioner's guilt, it can safely be said that the failure of petitioner's attorney to cross-examine Burke about the disciplinary proceedings against him was harmless beyond a reasonable doubt. As both courts below observed (Pet. App. 3, 6), the effect on the verdict of any additional evidence concerning the agent's credibility "was so remote and negligible when compared to the direct evidence against petitioner that the court cannot conceive of the possibility that the verdict would have been any different had such evidence been presented."

Petitioner nonetheless claims (Pet. 6-14) that a conflict exists among the circuits as to whether a defendant whose attorney is also representing a government witness must show prejudice in order to establish the ineffective assistance of counsel.

Although there is some variation in the formulation of the proper standard for evaluating claims of ineffective assistance of counsel in this situation, it is far from clear that there is any substantial difference in the standard as it is actually applied. The First Circuit distinguishes between cases of joint representation of co-defendants, where the attorney is "particularly susceptible to disabling conflicts," and cases of dual representation, where an attorney presently has, or in the past has had, a legal relationship with a hostile party or witness, and in which the danger of conflicts is not as great. In the case of joint representation of co-defendants the court requires

only a relatively slight showing of actual prejudice; in the case of dual representation, however, "a real conflict of interest or a specific instance of prejudice must be shown." United States v. DiCarlo, 575 F.2d 952, 957 (1st Cir. 1978). See also Miller v. United States, 564 F.2d 100, 106-107 (1st Cir. 1977). This standard thus contemplates that an attorney's dual representation of the defendant and a hostile government witness, in and of itself, will not always constitute a conflict of interest requiring reversal.[4/]

4/ The District of Columbia Circuit, like the First Circuit, has also indicated that dual representation will not by itself warrant automatic reversal of the defendant's conviction. As the court stated in District of Columbia v. Scott, 214 F.2d 860 (D.C. Cir. 1954).

> Each case of this sort must be judged on its own merits. The decision here certainly should not be taken as a holding that a defendant can escape justice merely by hiring a lawyer who represents, in another case, a witness against that defendant. It means that under all the circumstances of this case there was a failure of representation which deprived [the defendant] of a fair trial.

See also United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); Kaplan v. Bombard, 573 F.2d 708 (2d Cir. 1978).

The Fifth Circuit, on the other hand, has made no distinction between dual and joint representation cases in assessing ineffective assistance of counsel claims. Thus, in cases involving dual representation, the court has simply adopted this Court's language in Holloway v. Arkansas, supra, and Glasser v. United States, 305 U.S. 60 (1942) -- cases that involved joint representation -- and held that once the defendant has demonstrated the existence of a real conflict of interest, he need not slow specific prejudice. But in every dual representation case in which that court has found a conflict requiring reversal of the defendant's conviction, not only has the client-witness been a crucial witness for the prosecution, but the conflict between the defendant's interests and those of the government witness has been flagrant. Because the conflict in these particular cases may well have adversely affected the attorney's entire representation of the defendant, the Fifth Circuit has declined to speculate as to the precise amount of prejudice suffered by the defendant, and has simply presumed the existence of reversible prejudice. See Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979) (defendant's trial attorney also represented in related criminal charges defendant's co-indicate, the government's "star witness," whose plea agreement with the government depended on his testifying against defendant at trial); Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974) (defendant's attorney simultaneously represented, in unrelated litigation, the victim of the offense for which the defendant was charged, and who was a principal witness for the prosecution); Porter v. United States, 298 F.2d 461 (5th Cir. 1962) (defendant's attorney also represented in separate proceedings a key government witness against defendant; to establish defense claim of entrapment, attorney would have had to implicate criminally the client-witness).

Here, by contrast, Agent Burke was not a crucial government witness; independent, overwhelming evidence established petitioner's guilt.[5/] Nor was the conflict of interest so flagrant as to infect the entire representation of petitioner by his attorney; only the cross-examination by petitioner's attorney of Agent Burke might have been affected. No court has required reversal of a defendant's conviction on such facts.

2. Petitioner further claims (Pet. 14, 19-21) that the prosecuting attorney's failure to inform the court before trial of the conflict constituted the denial of a fair trial. We agree that the prosecutor should have brought this situation to the court's attention if defense counsel did not do so and if the prosecutor believed petitioner had not consented to the representation in these circumstances. Absent prejudice, however, this omission does not warrant reversal of the conviction. See United States v. Agurs, 427 U.S. 97, 107-110 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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5/ That Burke was not a crucial government witness also distinguishes Davis v. Alaska, 415 U.S. 308, 310 (1974), which presumed prejudice from an order barring certain cross-examination of "a crucial witness for the prosecution."